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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 296

WILLIAM G. BURNS,
trading and doing business as International Advertising Agency,

Petitioner,

vs.

BEN JAFFE,

GUARANTEE RESERVE LIFE INSURANCE COMPANY of Hammond, Indiana, a corporation, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE
and tendered
PETITION FOR REHEARING OF
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit.

JAY E. DARLINGTON,
306 Hammond Building,
Hammond, Indiana,
Attorney for Petitioner.

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MOTION FOR LEAVE TO FILE

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner and respectfully petitions for leave to file the appended Petition for Rehearing, and shows:

I. On October 13, 1958 this Court denied his Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, docketed under the above term number.

2. Petitioner did not file a Petition for Rehearing within twenty-five days thereafter, expiring November 7, 1958, nor Petition for an extension of that time, because that was not reasonably possible under the circumstances, to-wit: During said twenty-five day period, Petitioner's sole counsel herein, the undersigned Jay E. Darlington, was unavoidably and fully occupied with previously scheduled litigation in the federal courts, particularly the argument of an important civil appeal, No. 16817 in the United States Court of Appeals for the Fifth Circuit at Atlanta on October 21, and the preparation and argument of a large civil action No. 4639 in the United States District Court for Puerto Rico on November 5, 1958, — which required him to be absent from his office a substantial part of said period and absent from the country during the latter part of said period. This Petition for Rehearing has been prepared and tendered at the earliest reasonable opportunity thereafter.

3. The Court of Appeals stayed the going down of its mandate to the District Court pending the filing of this petition. No affirmative judgment is being stayed below. The judgment of the Court of Appeals is a dismissal of Petitioner's appeal from a judgment of the District Court which adjudged that this Petitioner as plaintiff recover nothing by his complaint in an important civil action seeking judgment in the sum of several million dollars.

4. The tendered Petition for Rehearing seeks to present a new *Constitutional* question of *due process*, unusual in character, which Petitioner believes deserves consideration by this Court, as appears on the face thereof. The important question involved on a motion of this kind, for leave to file, is whether the tendered Petition for Rehear-

ing has merit, — whether an error or injustice has resulted from refusal of Certiorari, — rather than the procedural speed of the petitioner's counsel.

WHEREFORE, Petitioner prays leave to file his tendered Petition for Rehearing which is hereto appended, and for all other just and proper relief. (The good faith of this Motion is included in the certificate at the foot of said Petition).

JAY E. DARLINGTON,
Attorney for Petitioner.

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner and respectfully petitions that the Court may rehear, reconsider and thereupon grant his Petition for Writ of Certiorari herein, which was denied by its order of October 13, 1958, and shows:

The New Constitutional Question Presented.

Petitioner contends that he was denied due process of law contrary to the Fifth Amendment by the Court of Appeals' unusual and arbitrary course of conduct in depriving his counsel of reasonable opportunity to file his Appellant's Brief and Appendix, ordering his appeal dismissed for lack of same, and then refusing leave to file same after it was printed and tendered at great labor and expense at the earliest opportunity.

This contention is predicated upon the same facts and record set forth in his Petition for Writ of Certiorari. But that Petition was predicated on the ground that this action by the Court of Appeals constituted a *mal-administration* of judicial proceedings calling for exercise of this Court's *supervisory* power under its *Rule 19, par. 1(b)*. (Petition for Certiorari, pp. 2, 20).

This *Constitutional* aspect of the factual situation was not presented in the Petition for Certiorari. Accordingly, Petitioner believes it fairly constitutes a new "substantial ground available to Petitioner although not previously presented" under *Rule 38, par. 2*. Failure to present it was because circumstances compelled petitioner's counsel to prepare and print the Petition for Certiorari under much pressure of time at the end of the 90-day period without an opportunity to study and develop this Constitutional aspect. In addition, he was convinced that the question of *mal-administration* was sufficiently clear to warrant relief, and he had in mind the principle that a reversal will not be predicated upon a Constitutional question if another adequate ground exists. This Court's order denying the Petition decides against petitioner on that question and it is not re-argued in the present Petition, though of course it is open for the Court's reconsideration on its own motion in its discretion, as an incident to considering this Petition.

Reasons for Rehearing.

Supporting this new Constitutional question, and as a new ground relied on for allowance of the writ, petitioner respectfully submits:

Factual Basis.

1. *In fact,* under the circumstances shown, the Court of Appeals deprived petitioner's sole counsel of a fair and adequate opportunity to prepare, print and file the necessary Appellant's Brief and Appendix, in view of the enormous size of the record which came up from the District Court, plus the intervening circumstance of his counsel's illness consisting of a physical collapse from overwork which occurred during the period allowed for preparing the Brief and Appendix. (Petition for Certiorari, pp. 4, 20; Appendix of Petition, pp. 63-67).

2. The unusual and arbitrary determination exhibited by the Court of Appeals *to circumvent and thwart* the petitioner's announced attempt to tender his Appellant's Brief and Appendix, *by making repeated orders dismissing the appeal before he could make his tender,* even though the first dismissal order was invalid because of the Court of Appeals' own violation of the Judicial Code in failing to have a duly constituted Division. (Petition for Certiorari, pp. 22-23).

3. Finally, the Court of Appeals' arbitrary refusal of the tendered Appellant's Brief and Appendix, while the matter was still pending before it. (Petition for Certiorari, p. 23, bottom; Appendix of Petition, pp. 67, 74-75).

(The manuscript transcript certified up to this Court by the clerk of the Court of Appeals, contains a copy of the tendered Appellant's Brief and Appendix, the latter being in three volumes of 572 pages, representing an obvious

cash outlay for printing of more than $3,000.00 in a good faith but so far futile attempt to present petitioner's case to the Court of Appeals. Naturally, this tendered Brief and Appendix could not be included or appended in the Petition for Certiorari, but it is described therein.) (Petition for Certiorari, p. 18; Appendix of Petition, p. 67).

Constitutional Basis.

While we have no quarrel with the present general policy of expediting litigation in the federal courts (*American Bar Association Journal*, Nov. 1958, Vol. 44, p. 1043), all will agree that **this policy should not be carried to the extreme of impeding the necessary and proper functions of the attorneys, who are themselves officers of the courts, and thereby in fact impairing the Constitutional rights of their clients to a fair and adequate hearing in the courts.** (*American Bar Association Journal*, Vol. 44, p. 1070).

The basic Constitutional principles here involved need no elaboration: Due process under the *Fifth Amendment*, applicable here, "has never been a term of fixed and invariable content" but requires a fair "*opportunity*" to be heard, and it depends on *the practical circumstances of each case* as to whether that opportunity has been denied and what procedure is reasonably necessary to measure up to it. (*Federal Communications Commission* v. *WJR, The Goodwill Station*, 1949, 337 U.S. 265, 275-276). The same is true on the analogous question of due process under the Fourteenth Amendment, where it is "an elementary and fundamental requirement" that the party be given a reasonable "opportunity" and "*a reasonable time*" to present his side of the case "*with due regard for the practicalities and peculiarities of the case*". (*Mullane* v. *Central Hanover Bank & Trust Co.*, 1950, 339 U.S. 306, 314-315). This protection is given to each "individual"

litigant; there must be an absence of "discrimination" *in fact*, and this Court will apply "scrutiny" to the particular situation to determine if this requirement is met. (*Shelley* v. *Kraemer*, 1948, 334 U.S. 1, 21-22). See also in general on this point, *16A C.J.S., Constitutional Law, Sec. 622.*

True, the above cases deal with proceedings in trial courts or other lower tribunals. True also, as a general proposition there is no Constitutional right to take an appeal after a fair and adequate hearing in the lower tribunal. But when a right of appeal is granted to a class of litigants, as the Judicial Code does from final civil judgments in the District Courts (*28 U.S.C. 1291*), the Court of Appeals must hear such cases *without discrimination* as between litigants, and it must also exercise its functions in all cases in such manner as to perform its duties and afford a fair review in fact. (*National Union of Marine Cooks & Stewards* v. *Arnold*, 1954, 348 U.S. 37, 43. *16A C.J.S., Constitutional Law, Sec. 626, p. 847*).

Attorneys have a dual function, — as spokesman for their clients in the trial and review of cases, and also *as officers of the courts*, charged with important functions in aiding the work of the courts by fully and efficiently presenting the facts and law on their respective sides. They will poorly serve both their clients and the courts if they are unreasonably driven and deprived of adequate time to do their work. The courts, by the nature of their position and powers, are able to perform their functions without this hardship. They should afford equal consideration to the attorneys. The rules of this Court clearly indicate a policy that, while the attorneys should perform their functions expeditiously, they are also expected to aid the Court's work by an adequate presentation of the facts and law for review. The same policy should prevail in the lower courts.

Petitioner respectfully urges that this Constitutional aspect of due process, — the right of a litigant to have his attorney afforded a fair and adequate opportunity under the circumstances to present his case in the trial court or on appeal when the right of appeal exists, — is a question which has not frequently been presented here but which assumes increased importance and need for consideration by this Court as the counterpart of the current program of expediting litigation, to keep the latter from getting out of balance.

WHEREFORE, Petitioner respectfully prays that this Court may rehear, reconsider and thereupon grant his Petition for Writ of Certiorari, and that he may have all further just and proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner.

I certify that the foregoing Petition for Rehearing is filed in good faith and not for delay, and that to my best belief and understanding it presents a substantial ground available to petitioner although not previously presented, supporting the Petition for Writ of Certiorari herein, within the intent of this Court's Rule 58, par. 2. I further certify that the preceding Motion for Leave to File is likewise filed in good faith and not for delay, for the same purpose.

JAY E. DARLINGTON,
Attorney for Petitioner.